IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

COMPANY APPEAL NO.3 OF 2004

IN

COMPANY PETITION NO. 12 OF 1998

. In the matter of Section-10F of the Companies Act, 1956

Vinod Kumar ...Appellant
(Orig. Petitioner)

vs.

M/s. Sigmalon Equipment P.Ltd and Ors. ...Respondents
(Resp.nos.2 to 6 Orig.Resp)

W I T H

COMPANY APPEAL NO.6 OF 2003

IN

COMPANY PETITION NO. 12 OF 1998

. In the matter of Section-10F of the Companies Act, 1956

Sigmalon Equipment P.Ltd and Ors. ...Appellants

vs.

Vinod Kumar ...Respondent

CORAM: S.U. KAMDAR, J.
DATE : 16TH JUNE, 2005

JUDGMENT :

1. Both these appeals are filed against the order passed by the Company Law Board on 5.5.2003 in Company Petition NO.12 of 1992. Both the parties to the said company petition have preferred the present appeal.

2. The present appeal is filed under section 10(f) of the Companies Act, 1956 raising two substantial questions of law as framed by the learned Single Judge of this court in Company Appeal No.6 of 2003 and by an order dated 15.1.2004 are as under :

(1) Whether the market value determined in respect of the shares held by the Respondent can be said to be just and proper ?

(2) Whether the Respondent would continue to exercise rights as Director of

the Appellant Company until the amount towards the valuation of his shares held by the Respondent is paid over to him ?"

3. The aforesaid questions of law arises on the following background of facts which are briefly enumerated as under :

4. The petitioner Mr. Vinod Kumar who is holding 40% of the shares in the respondent no.1 company preferred a petition under section 397 and 398 of the Companies Act, 1956 before the Company Law Board. He has alleged in his petition that there is an oppression of his group of shareholders by acts of majority of shareholders and there is a rampant mismanagement in the affairs of the first respondent company. In support of the aforesaid contentions various allegations and counter allegations have been advanced by both the parties. However after hearing in detail the said company petition the company Law Board passed an order being order dated 20.8.1999. By the said order the Company Law Board gave two

options to the petitioner. Under the first option it was provided that the petitioner can chose to continue to be part of the company and retain his 40% share holdings. In that event he can continue to be a director of the company with remuneration. However, he can not participate in day to day affairs and management of the said company. The second option given to him was that he can sell his shares to the the other group of shareholders at a price to be determined by an independent valuer. A time period was prescribed within which he was entitled to exercise any one of the aforesaid options.

5. It has been further provided under the said order of the company law Board that either of the option choosen by the petitioner will be binding on the respondents. It has also been held that if the petitioner choses the first option i.e. the option to continue with the company with 40% shares and also as a director with remuneration then the company will ensure that the petitioner gets notice of all board meetings and general body meetings of the company. Furthermore the petitioner being 40% shareholder the

petitioner will get two-third of the perquisites of the total perquisites drawn by other group of directors of the company. It is further provided in the said order that there will be no change in the share capital of the company without specific consent of the original petitioner. It was stipulated that the business obtained from M/s. Bajaj Auto Ltd shall not be transferred to the new company and shall be pursued only by the respondent company. It was provided in the said order that in an event if the petitioner choses the second option then he will communicate the said exercise of option to the company law board who will in turn appoint chartered accountant to determine the valuation and purchase price of the said shares which shall be payable by the respondents to the petitioner.

6. While giving the aforesaid two options the Company Law Board has provided that notwithstanding any option he may chose the company will pay him arrears of remuneration and other perquisites which he was obtaining before the dispute started and the aforesaid payment will be made on or before 31.9.1999

subject to the condition that the petitioner will return the FTRs which are in his possession. With the aforesaid order the company petition was disposed off on 21.10.1999. Pursuant to the said directions of the Company Law Board on 21.12.1999 the original petitioner decided to exercise the second option of selling his shares to the respondent company at a price to be determined by an independent valuer. The Company Law Board on his request appointed M/s. Price Water House (COOPERS) Ltd to determine the fair price of the shares in accordance with the accepted principles for valuation of the said shares. On 1.5.2000 the company law board directed that the valuation of the shares will be as on the date of 31.3.1998 and further directed the original respondent company to pay Rs.6,35,91.61/- towards the arrears of remuneration and perquisites to the petitioner.

7. On 1.3.2001 M/s. Price Water House (COOPER) was appointed as valuer and on 13.12.2001 the said valuer has submitted its report. Thereafter a Company Application being No. 107 of 2002 was

heard by the Company Law Board on 25.6.2002. On the said date the Company Law Board has passed an order that both the parties agree that the company law board will determine the final value of the shares and also decide objections raised by the parties to the said valuation report. whether the petitioner is It was provided in the said order that the decision of the company law board will be final and binding on both the parties. However it seems that another order was passed in respect of the very same hearing on the very same day i.e. 25.6.2002 without recalling the earlier order passed by the company law board. The company law board thereafter passed another order on 26.8.2002 in respect of the aforesaid hearing interalia providing that the objections raised by the original petitioner will be heard by the valuer himself.

8. Pursuant therein it seems that the M/s. Price Water House (COOPER) has considered the objection and revised his report and filed the same with the Company Law Board on 22.1.2003. The original petitioner filed objections to the revised

valuation report of M/s. Price water house (COOPER) on 22.2.2003. The original respondent company also filed objections to the said revised valuation report of Price Water House (Cooper). The said objections of both the parties have been considered by the company law board on 5.5.2003 and Board has passed an impugned order which is challenged in this appeal.

9. In the light of the aforesaid facts in the present appeal aforesaid two questions of law has been framed as substantial questions of law under section 10(f) of the Companies Act.

10. First of all it is clear from the facts that both the parties are aggrieved by the revised report filed by the Price Water House Coopper and both the parties are equally aggrieved by the order passed by the Company Law Board on 5.5.2003 and therefore cross appeals are preferred before this court, one by the original petitioner and another by the original respondent company.

11. Whilsh determining the first question of law

i.e. whether the market value determined in respect of the shares held by the petitioner can be said to be just and proper. I am of the opinion that sinc both the parties are aggrieved by the said valuation report determining the market value of the said share the valuation ex-facie cannot be considered as just and proper. However the contentions which are advanced before me by the parties indicate that there are different modes of challenge to the said valuation repot of the Chartered Accountant and thus I propose to go into the details of the nature of challenge to valuation report.

12. Appeal no.6 of 2003 which has been preferred by the respondent company challenges the order passed by the company law board as well as challenges the valuation report on a very limited ground. Learned counsel Mr. Setalvad appearing for the company has contended that the valuation report in so far as it takes into consideration the valuation of plot-A9 and A-10 being as an asset of the company is erroneous and inaccurate. It has been contended that the said properties do no form part of

the fixed assets of the company and therefore the said properties ought not to have been included in the valuation report prepared by the valuer. In the alternative he contends that even if the said plots are to be included as the assets of the company then still the ratio of premium fixed by the valuer of 50% each between the respondent company and MIDC is totally erroneous. It has been contended that the said plot of land ought not to have been included in the valuation report and the same being severable the court must severe the said part of the report from the said valuation and reduce the valuation and consequently reduce the price of the shares as fixed by the valuer.

13. On the other hand the learned counsel appearing for the petiotioner has whole heartedly criticised the said valuation report. It has been contended that this court for the reasons stated hereinafter should reject the said valuation report in its entierity and not in part as suggested by the learned counsel for the respondent company. Firstly it has been contended by the learned counsel for the

petitioner that the valuer has by his own conduct has lost the independent character and merely acted as an agent of the respondent company. He has relied upon a letter dated 1.3.2001 which has been issued by the Price Water House (COOPER) to the company as private and confidential. The said M/s. Price Water House (Cooper) has inter-alia stated in the said letter as under :

> . We are writing to you to set out out understanding of the nature and purpose of this valuation engagement, the approach and scope of examination will apply, our restrictions and our proposed fee arrangements.
>
> . SEPL has agreed that in the time available we should restrict the extent of our verification work and rely solely on the information and data supplied by SEPL. Consequently, SEPL will accept full and sole responsibility for the

reasonableness and reliability of this information and data and that our valuation will be subject to this limitation.

. In performing our valuation, we may rely on the audited financial statements for the 5 years ended March 31, 2000 and the projected earnings and balance sheet of SEPL for the period from April 1, 2000 to March 31, 2003, as prepared by the Management (together the 'Management Information') and also consider the views of respondent/petitioner. Our reliance on the use of the Management Information should not be considered as an expression of our opinion on it, and we inaccuracies in it on our valuation report.

9. Acknowledgement and Acceptance . We should be grateful if you would acknowledge receipt and your acceptance

of this letter by signing one copy in the space provided and returning it to us before we commence work. If you wish to discuss the terms of our appointment further before replying, please let us know."

14. This letter has been acknowledged and accepted by the said company by putting their signatures at the bottom of the said letter. By placing reliance on the said letter dated 1.3.2001 it has been contended by the original petitioner that the valuer having lost its independent character the entire exercise of the valuation by such a valuer is in futility. It has been therefore contended that there is a distinct bias of the valuer against the original petitioner in favour of the company. In answer to the aforesaid contention the respondent company has contended that the aforesaid letter dated 1.3.2001 was received by the original petitioner on 27.3.2001. However in the subsequent correspondence the original petitioner

has raised no objections to the said letter and thus they are not entitled to raise the grievance at this stage. However from the record I find that the objections were raised to the said letter by the original petitioner both before the valuer as well as before the Company Law Board. In my opinion the independent valuer must have its own approach and method for for valuing the assets of the company. The letter dated 1.3.2001 inter-alia indicates that the valuer appointed by the company law board has ignored the fact that he is appointed by the tribunal in exercise of quasi judicial power and thus required to act independently. He has purpotetdly proceeded on a footing that the respondent company has appointed them as a valuer for valuation of the assets. It is not only that but the letter indicates that parameter for valuation of the assets were not fixed by the valuer but by the company. The entire approach of the valuer I find is totally erroneous and lacks bonafide in the present case. The larned counsel for the company has however relied upon a judgment in the case of **Burgess and Anr vs. Purchase and**

sons (Farms) Ltd and Ors reported in 1983 (2)All England Report Page 4 and has purpotedly contended that if the valuation report is not a speaking valuation report giving reasons in support of its conclusion than neither the company law board nor the court has jurisdiction to go into the validity and or otherwise of the same. I am not in agreement with the contentions advanced by the respondent company. I am of the view that there are already disputes between the parties where the judicial tribunal has appointed an authority as an expert body for carrying out and discharging the duty in place of tribunal itself then such an independent agency or authority must come directly under the jurisdiction of such a tribunal and the authority appointed cannot act as an agent of either of the parties to the lis. It is very significant that to build confidence in such an expert body the independence of such an authority or expert must be preserved and kept intact. In my opinion by virtue of the fact that the approach adopted by the Price Water House (COOPER)- being valuer as indicated in their own letter dated 1/3/2001 it is clear that,

the said valuer had lost independent character and has acted as an auditor appointed by the respondent company which is totally illegal. Thus the report prepared by such an expert body is of not any worth and thus cannot be taken into consideration. By ignoring the aforesaid contention the company law board has upheld the report prepared by the said valuer which in my opinion is not correct exercise of jurisdiction by the Company Law Board.

15. It has also been contended by the petitioner that once the first valuation report was prepared by the valuer and that objections to the same were filed by the petitioner then the same ought to have been decided by the company law board itself. It has been contended that infact by an order dated 25.6.2002 both the parties as well as the company law board agreed that the said objections will be determined by the Company Law Board. Without recalling and or setting aside the order dated 25.6.2002 and without giving any opportunity of further hearing the company law board has passed a second order on 28.6.2002 in respect of the very

same hearing of 25.6.2002 and remanded the matter back to Price Water House (COOPER) for determining all objections raised on his own valuation report. I find that the whole approach of the company law board to remand the matter back to the Price Water House (COOPER) was erroneous. The valuer who has prepared the valuation report cannot definitely go into the objections raised by the parties to the same. It has to be before the board and or the authority who has appointed the valuer. The Company Law Board was duty bound to determine the said objections and could not have abducted the said duty by sending the objections to the valuer for determination. It has been further urged on merits by the learned counsel for the petitioner that the approach of the valuer in determining the valuation of the various assets is totally wrong and erroneous. Plainly speaking for me as a judge it is not possible to substitute the facts and figures pertaining to the valuation of the various assets of the company. Furthermore I am neither equipped nor an expert in determining the valuation of the various assets and principles on which the various

depreciations and or reductions are required to be given on various assets of the company. I find that the valuation report prepared by the valuer lacks basic principles of independence. The said report is also the subject matter of challenge by the both the parties. I am unable to accept the contention of the learned counsel for the respondent company that I must accept the part of the report and reject part of the said report. It is not possible for me to do so especially while deciding the matter under the jurisdiction under Section 10(f) of the Companies Act. However in view of the fact that the valuation report is found to be lacking in basic principles of independence I set aside and reject the said valuation report in its entirety. I am also of the opinion that to remand the said valuation report to the Company Law Board for redetermination of the valuation of the various assets would be an exercise in futility. It Firstly because twice opportunities were given by the company law board to revise the valuation still neither of the parties are satisfied. Secondly because once I have come to the conclusion that

valuer were not independent in their approach of preparation of the valuation report it is necessary that I should reject the said report in its entirety and should direct the Company Law Board to appoint another Chartered Accountant for revaluation of the assets of the said company and determination of valuation of the said shares. It is needless to state that the valuer will determine the valuation of the said assets as independent agency and on his own parameters and approach and would not seek any assistance either of the petitioner and/or of the respondent company. I am of the further opinion that the valuation report prepared by the said valuer must be as of the date fixed as 31.3.2005 and the valuation must be taken into consideration as on the date of 31.3.2005. I am of the aforesaid opinion because the petitioner is a 40% shareholder in the company. His shares have remained stagnant in the said company. Furthermore if the asset of the company have appreciated then the value of his shares must necessarily and correspondingly appreciate and therefore it is necessary that the valuation of the said assets must take place as on

31.3.2005 which is the end of the closest financial year. The said Chartered accountant appointed by the Company Law Board as valuer shall hear both the parties and thereafter arrive at his own valuation. The respondent company will provide all documents and papers, vouchers and any other material which is in their custody and possession as and when called upon by the said valuer. In an event if the valuer finds any difficulty in obtaining any of the material documents necessary then in that event the valuer will approach the Company Law Board for further necessary directions. Fees of the valuer will be shared by both the parties in their proportion of 40% and 60% i.e. the original petitioner will pay 40% and the respondent company will pay 60% of the fees charged by the valuer. The said valuation report once filed before the Company Law Board, the Company Law Board will hear the matter expeditiously and dispose off all objections thereto expeditiously as possible but in any event within six months from the date of filing of the valuation report.

16. Now turning to the second question of law about the remuneration of the director it has been contended by the original respondent company that the petitioner is not entitled to payment of any remuneration once he exercises the second option. It has been contended that the remuneration shall be available to the petitioner only if he exercises first option i.e. to continue to remain with the company as shareholder and as a director he would not exercise the option of sale of his shareholdings. It has been contended that the directions given by the company law Board in his original order dated 20.8.1999 to pay the remuneration to the petitioner as a director would cease to be operative as soon as he exercises the second option. He has therefore contended that the decision of the company law board in the impugned judgment that the original petitioner is entitled to remuneration up to the date from the period from 1.10.1999 to 31.3.2002 is erroneous and baseless. On the other hand the learned counsel for the petitioner has contended that the company law board ought to have granted not only the remuneration of the entire period but it should have been on the

basis of equal remuneration to both the directors because there were only two directors i.e. the original petitioner and the second respondent. It is further contended that the decision of the company Law Board to grant only two-third of the remuneration drawn by the second respondent as a director and that also for a limited period is wrong and without any merits. The respondent company has on the other hand contended that it is the petitioner who has raised objections to the said valuation report and because of which the matter has lingered and therefore they are not entitled to any remuneration till and until his shares are purchased. My attention has been drawn by the learned counsel for the petitioner that before the company law board the respondent company made a statement that they are not challenging the report of the valuer i.e. Price Water House but infact they have filed the present appeal which is pending in this court for the last two years and has further resulted in non-payment of the shares value as well as the remuneration to the petitioner as a director of the company. Looking at the submissions I am of the opinion that admittedly the petitioner is

holding 40% of the shares in the respondent company. He is entitled to all returns in respect of the said shares which he is holding till and until the said shares are sold or transferred and the consideration is received by him. Time and again the said valuation report is challenged right up to this court. The end result is that the petitioner is not able to get the value of the shares in the respondent company. On the other hand the second respondent who is the other director of the company is enjoying all the benefits and managing the affairs of the company. It has been contended by the learned counsel for the respondent company that even the second respondent has not drawn any remuneration/perquisities. It is not possible to ascertain whether the second respondent has drawn remuneration or not but the second respondent has been enjoying all the facilities. I am therefore of the opinion that the ratio of two-third to the remuneration drawn by the second respondent fixed by the Company Law Board cannot be altered at this stage but the petitioner will be entitled to the said remuneration and or perquisites through out the period till and until the

shares are evaluated and payments are offered in respect of the shares. Thus I direct the original respondent company to make payment of the arrears remunerations and of the perquisites up to the date of 31.3.2005 within a period of two months from today to the original petitioner in the ratio of two-third of the total remuneration and perquisites drawn by the second respondent. The said payments will be made by the respondent company with interest at the rate of 12% p.a. to the petitioner herein since he has been deprived of the same all through out. The remuneration as directed by the Company law board has also not been paid. In view thereof I pass the following order.

17. Both the company appeals are disposed off as per the following directions :

(i). In so far as the first question of law is concerned I hold

that the valuation report is not just and fair and is suffering from bias and non-independence of the valuer. I accordingly set aside the said valuation report in its entirety. I direct that the shares held by the petitioner will be reevaluated by the Chartered Accountant appointed by the Company Law Board as on 31.3.2005. I further direct that the Company Law Board to appoint such Chartered Accountant for valuation of share price within a period of thirty days of the receipt of the present order. I further direct that the Company Law Board shall fix a time schedule within which the Chartered Accountant should complete the exercise of valuation of the said shares. The said Chartered Accountant shall file the valuation report in sealed cover with the

company law board in company Petition no.12 of 1998.

(ii) Fees of the Chartered Accountant shall be shared by both parties, 40% by the petitioner, 60% by the Respondent.

(i) Before finalising the report the said Chartered Accountant will give opportunity to both the parties to give their facts and figures pertaining to the valuation of his report and shall make the final valuation keeping in mind the submissions made by the parties.

(ii) The said report shall be filed before the company law board by the said Chartered Accountant within a period of two weeks from

the date he has completed the said valuation. On the said report being filed, the company law board will give notice to both the parties and furnish a copy of the valuation report to both the parties and thereafter invite objections from either of the parties within a a stipulated period of time. If the objections are received then the company law board will consider the same by itself without remanding back to the valuer and pass appropriate order on such valuation report prepared by the valuer.

iv). The company law board will pass final orders as expeditiously as possible but in any event within a period of six months from the date of the valuation report filed by the said Chartered Accountant

before the company law board.

(v) In so far the second question of law is concerned I hold that the original petitioner is entitled to payment of remuneration and perquisites till the date his shares are evaluated as per the second option and the necessary amount paid by the company as per the valuation report. Arrears of the remuneration as of 31.3.2005 shall be paid within 2 months alongwith interest @ 12% p.a. from the date of impugned order till the date of payment.

(v) Furthermore on such payment offered by the respondent company to the petitioner the original petitioner will cease to claim any remuneration and will be entitled to the said price of his shares.

The original petitioner on payment being made will effect transfer of all his shares and also will resign from the directorship of the company and will cease to have any claim inrespect of the remuneration and perquisites as a director of the company.

(vi) With the aforesaid directions both the appeals are disposed off with no order as to costs.

sd/-

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